

Structure Tone, Inc. v Universal Servs. Group, Ltd.

2010 NY Slip Op 31384(U)

June 3, 2010

Supreme Court, New York County

Docket Number: 106810/06

Judge: Carol R. Edmead

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

6
6310

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 106810/2006

STRUCTURE TONE

vs

UNIVERSAL SERVICE GROUP LTD.

Sequence Number : 006

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED
APPROX. NUMBERED
JUN 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motions sequences 006, 007, 008, 009 and 010 are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that, in motion sequence no. 006, the motion for summary judgment is granted and the third-party complaint is dismissed against Tremco Incorporated with costs and disbursements as calculated by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, in motion sequence no. 007, the motion for summary judgment is granted and the third-party complaint and all cross claims are dismissed as against Pace Plumbing Corp. with costs and disbursements as calculated by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

ORDERED that, in motion sequence no. 008, the second third-party complaint and all cross claims are dismissed as against Prep-Crete Inc. with costs and disbursements as calculated by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, in motion sequence no. 009, the third-party complaint and all cross claims are dismissed against SBLM Architects with costs and disbursements as calculated by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, in motion sequence 010, the motion for summary judgment is granted to the extent that the 5th, 6th, 23d, and 24th causes of action in the complaint are severed and dismissed; and it is further

ORDERED that counsel or Tremco shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel; and it is further

ORDERED that the remainder of this action will continue.

FILED
JUN 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated 6/3/10

ENTER: [Signature], J.S.C.

HON. CAROL EDMOND

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

-----X
STRUCTURE TONE, INC.,

Plaintiff,

-against-

Index No. 106810/06

UNIVERSAL SERVICES GROUP, LTD,

Defendant.

-----X
-----X

UNIVERSAL SERVICES GROUP, LTD.,

Third-Party Plaintiff,

-against-

Third-Party Index No.
590800/06

PACE PLUMBING CORP., SBLM ARCHITECTS,
P.C., and TREMCO INCORPORATED,

Third-Party Defendants.

-----X
-----X

UNIVERSAL SERVICES GROUP, LTD.,

Second Third-Party Plaintiff,

-against-

Second Third Party
Index No. 590580/08

PREP-CRETE, INC.,

Second Third-Party Defendant.

-----X
CAROL EDMEAD, J.S.C.:

Motion sequence nos. 006, 007, 008, 009, and 010 are consolidated for disposition. In motion sequence no. 006, third-party defendant Tremco Incorporated (Tremco) moves, pursuant to CPLR 3212 (a), for summary judgment dismissing the third-party complaint and all cross-claims raised against it. In motion sequence nos. 007, 008, and 009, third-party defendant Pace

FILED
JUN 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

Plumbing Corp. (Pace), second third-party defendant Prep-Crete, Inc. (Prep-Crete), and third-party defendant SBLM Architects, P.C. (SBLM), respectively, move for the same relief, as to them. In motion sequence no. 010, defendant Universal Services Group, Ltd. (USG) moves, pursuant to CPLR 3212 (e), for partial summary judgment: (1) dismissing plaintiff's claims for damages resulting from occurrences on May 10, 2004, Sept 22, 2004, Nov. 4, 2004, and December 1, 2004 (USG has withdrawn that part of its motion which referred to October 12, 2004); (2) dismissing all claims associated with redesigns and upgrades; and (3) granting judgment as to the affirmative defenses of breach of the covenant of fair dealing, mitigation of damages, interference, frustration of performance, and waiver, and dismissing the 15 causes of action in the complaint that allege breach of contract.

This action arises out of the build-out (Work) of the Whole Foods market (Market) in the AOL/Time Warner Center, located at 10 Columbus Circle in Manhattan. Plaintiff, which was the general contractor for the Work, retained USG to waterproof the Market. The complaint alleges that, on 15 occasions from February 19, 2004 through February 24, 2005, the waterproofing failed, causing water to leak from the Whole Foods kitchen to the Time Warner security space on the cellar 2 level of the building, and that, as a result, plaintiff, which undertook to remedy the problem, sustained damages of \$1.2 million. In its first response to USG's demand for a bill of particulars, plaintiff stated that the alleged leaks had also damaged space leased by Equinox, also situated below the Market.

The third-party complaint and the second third-party complaint allege that the third-party defendants and the second third-party defendant, that is, subcontractors for the Work, none of which, other than Prep-Crete, had a contractual relationship with USG, and SBLM, which was the architect for the Work, are liable over to USG in contribution and implied indemnification. The third-party complaint purports to allege a separate cause of action against SBLM, alleging negligence, and three causes of action against Tremco, which supplied the waterproofing material that USG applied, alleging negligence, strict products liability, and breach of warranty. However, the relief that USG seeks in those causes of action is identical to that which it seeks in its first cause of action, to wit, contribution. Pace was the plumbing subcontractor. Prep-Crete was retained by USG to prepare the structural concrete slab of the raw space in which the Market was to be located, for the application of the waterproofing membrane.

With regard to each of the leaks, the complaint alleges both a cause of action for negligence and a cause of action for breach of contract. USG contends that the allegations of negligence in the complaint support USG's claims for contribution. However, plaintiff's responses to USG's demand for a bill of particulars specify plaintiff's damages as plaintiff's costs of remediation, future construction, loss of profit, recovery of the amounts paid to defendant, and contract balances not paid by Whole Foods. See *Giliberti Affirm.* ¶¶ 17-20, and Exhs. M, N, and O, and Exhibit Q, at 327-336, 346-348, and 367-370. Thus, notwithstanding the

allegations of negligence in the complaint, the damages that plaintiff seeks to recover are solely economic. Neither the fact that plaintiff's alleged damages exceed the value of plaintiff's contract for the Work, nor the fact that the damages result, in part, from the leakage from the Market to other property, transforms plaintiff's claim into one sounding in negligence.

"Ordinarily, the loss of the employer is the difference between the contract price and the fair cost to complete the contract under the conditions brought about by the breach." 36 NY Jur. 2d 50 (citations omitted); see also *Caggianelli v Sontheimer*, 46 AD3d 1206 (3d Dept 2007) (cost of remediation and completion, in excess of contract price, recoverable); *Hudson Iron Works v Beys Specialty Contr.*, 262 AD2d 360 (2d Dept 1999) (same). USG's reliance on *Sommer v Federal Signal Corp.* (79 NY2d 540 [1992]), *Castle Vil. Owners Corp. v Greater N.Y. Mut. Ins. Co.* (58 AD3d 178 [1st Dept 2008]), and *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.* (109 AD2d 449 [1st Dept 1985]) is misplaced. That, in circumstances of danger to the public, a party may be subjected to tort liability, regardless of its contractual duties, as in those cases, does not transform the economic damages that plaintiff seeks to recover in this action into tort damages.

Claims for contribution are governed by CPLR 1401. That statutory provision, which applies to "personal injury, injury to property or wrongful death," does not include within its ambit purely economic losses resulting from a breach of contract. *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw*

& Folley, 71 NY2d 21 (1987); *Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318 (1st Dept 2009). Where, as here, "a plaintiff's direct claims ... seek only a contractual benefit of the bargain recovery, their tort language notwithstanding, contribution is unavailable." *Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 897 (1st Dept 2003) (citations omitted). Accordingly, USG's claims for contribution fail, as a matter of law.

Implied indemnification is available to a party held vicariously liable for the fault of another; it is not available to a party alleged to have been actively at fault, itself. *Richards Plumbing & Heating Co. v Washington Group Intl., Inc.*, 59 AD3 311 (1st Dept 2009); *17 Vista Fee Assoc. v Teachers Ins. and Annuity Assn. of Am.*, 259 AD2d 75 (1st Dept 1999). The complaint seeks recovery from USG solely because of USG's alleged wrongdoing. Accordingly, USG's claims for common-law indemnification, too, fail, as a matter of law.

To the extent that the third-party complaint seeks to assert claims against SBLM and Tremco, other than for contribution or indemnification, such claims are barred by the absence of any contractual relationship between USG and either SBLM, or Tremco, or any other relationship between them that would impose a duty running to USG, and, in Tremco's case, by a warranty limiting its liability in regard to the waterproofing material to a refund of the purchase price, or replacement of the product.

USG cites a plethora of cases for the proposition that

architects are not immune from suit, including *O'Reilly-Hyland v Liberty Mgt. & Constr. Ltd.* (32 AD3d 765 [1st Dept 2006]), in which the Court affirmed the denial of a motion for judgment n.o.v., following a verdict for a homeowner on a breach of contract claim against an architect. However, a cause of action for professional malpractice against an architect, or another professional, with whom the plaintiff has neither a contractual, nor a quasi-privity relationship, is not viable, absent affirmative conduct by the defendant linking it to the plaintiff and evincing an understanding that the plaintiff will rely upon the defendant's professional activity. *Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417 (1989); *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 NY2d 536 (1985); *Parrott v Coopers & Lybrand, LLC*, 263 AD2d 316 (1st Dept), *affd* 95 NY2d 479 (2000). Here, it is undisputed that USG had no contract with SBLM, and that it was not a third-party beneficiary of SBLM's contract with nonparty Whole Foods. Nor is there any evidence of any link between USG and SBLM evidencing knowledge that USG would rely upon SBLM's plans and specifications. Indeed, when SBLM prepared those documents, not only USG, but even plaintiff, had not yet been retained. In short, USG was not known to SBLM, but was, at most, one of a class of unidentified potential users of SBLM's plans. That merely potential relationship does not suffice to support a claim for professional malpractice. *Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, *supra*; *Bri-Den Constr. Co. v Kapell & Kostow Architects, P.C.*, 56 AD3d 355 (1st Dept 2008).

It is undisputed that USG purchased the waterproofing material manufactured by Tremco from an independent distributor, nonparty LITSCO. Accordingly, there is no privity between USG and Tremco, and USG, a downstream purchaser, has "no cause of action in tort against the remote manufacturer for contractually based economic losses ... occasioned by the failure of the product which was the subject of [defendant's] arms' length, negotiated purchase" *Bocre Leasing Corp. v General Motors Corp. (Allison Gas Turbine Div.)*, 84 NY2d 685, 687 (1995); see also *New York Methodist Hosp. v Carrier Corp.*, 68 AD3d 830 (2d Dept 2009). Moreover, even if USG could raise a tort claim against Tremco, the latter's liability would be limited by the warranty referred to above. Contrary to the statement in USG's counsel's Affirmation In Opposition to Tremco, Tremco did not waive reliance on the limitation of liability in its warranty. The limitation on liability is alleged in the second affirmative defense in Tremco's answer.

The court now turns to the motion made by Prep-Crete. USG retained Prep-Crete to prepare the surface of the structural concrete slab for the application of the waterproofing material, by a process known as "shot blasting." Shot blasting consists of firing small round metal shots, or "bb"s, onto the floor so as to abrade it, and vacuuming the resulting dust. USG contends that Prep-Crete's performance of the shot blasting was deficient in that a "shadow of paint" remained in some areas, and scaling, that is, a powdery top surface of concrete which normally forms, but which should have been removed by the shot blasting, was found in other

areas. The second third-party complaint is not a model of clarity, in that it seeks to recover in indemnification, as well as contribution, but it alleges both breach of contract and negligence.

As to the paint residues, USG relies on the deposition testimony of SBLM, by its witness Philip Magnuson. As USG's counsel acknowledges, however, Mr. Magnuson stated that he did not know whether the paint markings which were placed, for example, where walls were to be installed, had been made prior to, or subsequently to, the shot blasting. Moreover, Brad Camarda, who is USG's Director of Operations, and who was USG's senior representative at the Work, testified at his deposition that he had been advised by Tremco to remove spray paint from the concrete slab with a hand grinder, and that he had determined that the presence of very small amounts of paint in the pores of the concrete would not adversely affect the application of the waterproofing membrane. McDermott Affirm., Exh H (denominated "B"), at 28, 53-54. As to the scaling, it is undisputed that there were areas of the concrete slab that it was not Prep-Crete's responsibility to shot blast, and there is no evidence that the scaling was found in those areas that Prep-Crete had shot blasted, or was required to shot blast. The contract between USG and Prep-Crete excluded "Edge Work" from the work that Prep-Crete was to perform. McDermott Affirm., Exh. F. Edge work, for which USG remained responsible, consisted, according to Mr. Camarda, in preparing those portions of the concrete floor that were adjacent to the perimeter wall, and that abutted the many

pipes that penetrated the concrete floor. McDermott Affirm., Exh. H, at 200. In addition, Mr. Camarda testified that he thought that he told the Pre-Crete worker at the site to skip the floor area on which standing water had accumulated, because shot blasting is done with a high-voltage machine, and that USG would prepare that area with a hand grinder. *Id.* at 207. Inasmuch as the opponent of a motion for summary judgment is required to lay bare its evidence, once the proponent of the motion has made a prima facie case (*Corcoran Group v Morris*, 107 AD2d 622 [1st Dept], *affd* 64 NY2d 1034 [1985]), it is apparent that USG cannot prove that Prep-Crete's work was deficient in any way.

Plaintiff's prima facie showing that it is entitled to judgment, as a matter of law, rests principally on the testimony of Mr. Camarda. Mr. Camarda testified that: on some occasions, he inspected Prep-Crete's work and found it satisfactory; on other occasions, another of USG's employees inspected the work and accepted it; no one complained to him about Prep-Crete's work, and had there been any complaints, he would have heard about them; USG would not have paid Prep-Crete had its work been unsatisfactory, and he thought that USG had paid Prep-Crete in full; and, had the shot blasting not been performed in a satisfactory manner in any location, USG would not have applied the waterproofing material in that location. McDermott Affirm., Exh. H, at 204-205, 46-47, 210, 211. When he was asked whether he had any problem with the work performed by Prep-Crete, Mr. Camarda replied "No." *Id.* at 211.

In sum, Prep-Crete has made a prima facie case that it is

entitled to judgment, as a matter of law, and USG has not adduced any evidence to show that Prep-Crete was at fault.

Finally, the court turns to USG's motion. With regard to the first branch of that motion, which pertains to leaks that occurred on certain dates, this court grants the motion as to the leaks that are alleged to have occurred on May 10, 2004, and December 1, 2004, and denying it as to the leaks that are alleged to have occurred on September 22, 2004 and November 4, 2004. Ron Pennella, plaintiff's director of operations, testified at his deposition that the May 10, 2004 leak was caused by the lack of a hub coupling connecting certain drain pipes, and that the December 1, 2004 leak was caused by water coursing through an electrical conduit that had been cut during the installation of the pipes penetrating the floor. Accordingly, USG cannot be held liable for such damage as may have been caused by those leaks. However, Mr. Pennella testified that the September 22, 2004 leak was caused by the failure of a pump in the sewage ejection pit of Whole Foods, that he did not know whether damage caused by that leak was part of plaintiff's claim against USG, and that he did not think that it was a waterproofing issue. That opinion is not a sufficient basis for granting USG summary judgment. With regard to the November 4, 2004 leak, USG relies upon the deposition testimony of Joseph P. Piscitello, the vice president of Pace. However, Mr. Piscitello disclaimed any knowledge of the circumstances of that leak. See USG Notice of Motion, Exhibit F, at 59. USG also relies upon the testimony of Mr. Pennella, but the testimony referred to pertains to the

December 1, 2004 leak, not that of November 4th. See Del Sordo Affirm. in Reply, at 5, and USG Notice of Motion, Exh. C, at 190-191.

As to USG's argument concerning damages claimed for upgrades, as distinguished from repairs, summary judgment is inappropriate for the following reasons. Mr. Pennella testified at his deposition that Veronica Lewis "processed all the water damage claims and everything as it relates to the repairs." USG Notice of Motion, Exh. C, at 326. Ms. Lewis testified at her deposition that the total billed to plaintiff by its subcontractors for repairs to the waterproofing system, and to the damage caused by the failure of the waterproofing membrane, amounted to \$741,762, and that, in addition, as a result of the leaks, Whole Foods had deducted \$329,809 from the contractual price that it owed to plaintiff. Mr. Pennella testified at his deposition that plaintiff spent \$542,876 for repair of the defective waterproofing work, and that plaintiff billed Whole Foods for sums that plaintiff had spent on upgrades, of which sums Whole Foods had paid approximately \$898,864 and was holding back \$198,886. Plainly, Ms. Lewis' \$741,762 figure for repairs is the sum of Mr. Pennella's \$542,876 figure for repairs plus the \$198,886 for "upgrades" that Whole Foods had not paid to plaintiff. However, USG has not shown whether the upgrades for which it disclaims responsibility have, in fact, been paid for by Whole Foods, and are, therefore, not part of plaintiff's claim for damages, or constitute a portion of the \$198,886 upgrade costs that plaintiff does claim as damages. Moreover, Ms. Lewis identified

both sums as attributable to "repair jobs." Collesano Affirm., Exh. D, at 29-30. Accordingly, USG is not entitled to judgment, as a matter of law, on the issue of upgrades.

Finally, the court addresses that branch of USG's motion that seeks the dismissal of all of plaintiff's contractual causes of action, noting that USG appears to have abandoned its claims of failure to mitigate damages and interference, except to argue that plaintiff required USG to perform its work quickly. USG's argument with respect to its claim that plaintiff violated the covenant of good faith and fair dealing is somewhat unclear, but it appears to be that Mr. Camarda made a number of fruitless complaints to plaintiff's liaison at the work site, concerning actions taken, or not taken, by Whole Foods and by plaintiff, that, Mr. Camarda contended, would, or might, compromise the waterproofing. See Del Sordo Affirm. (2/25/10), ¶¶ 28-30. For example, Mr. Camarda requested that certain tracks and walls, that had been installed prior to the application of the waterproofing membrane, be removed. They were not removed, and, subsequently, water made its way under those tracks. However, there is evidence in the record that USG's application of the waterproofing membrane was defective in multiple respects. For example, Mr. Magnuson testified at his deposition that USG had failed to install vertical flashing on the perimeter walls of the space. Accordingly, plaintiff's failure to accede to Mr. Camarda's requests does not entitle USG to summary judgment, because there is no evidence that the membrane would not have failed but for plaintiff's failure to honor Mr. Camarda's requests.

The doctrine of frustration of purpose is wholly inapplicable here. That doctrine offers a defense against enforcement of a contract, when an inducing circumstance of the contract ceases to exist. *Pettinelli Elec. Co. v Board of Educ. of City of N.Y.*, 56 AD2d 520 (1st Dept), *affd*, 43 NY2d 760 (1977). For example, a contract requiring the parents of a student to seek fees for the expert who testified in an action that the parents had brought pursuant to the Individuals with Disabilities Education Act could not be enforced after the United States Supreme Court held that the Act does not authorize prevailing parents to recover fees for an expert's services. *Arons v Charpentier*, 36 AD3d 636 (2d Dept 2007). The event that is asserted to excuse performance must have been unforeseeable, so that provision could not have been made for it, and "the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense." *Warner v Kaplan*, 71 AD3d 1, 6 (1st Dept 2009), quoting 22A NY Jur 2d Contracts § 375. USG does not adduce any unforeseeable frustration of an inducing circumstance of its contract with plaintiff.

USG's initial argument in support of its waiver defence appears to be that, because plaintiff imposed a backcharge on USG for its allegedly defective work, plaintiff has waived its right to sue USG. See Del Sordo Affirmation (2/25/10), ¶ 48. In its reply papers, USG argues that, because plaintiff directed USG to proceed with the waterproofing despite Mr. Camarda's observations and complaints, plaintiff waived "strict enforcement of the written

contract." Del Sordo Affirm. (4/23/10), ¶ 23. USG's argument fails because, among other reasons, and as noted above, there is evidence in the record that USG failed to place vertical flashing on the perimeter walls of the space, as well as on pipes that came up through the concrete slab. Del Sordo Affirm. (3/16/10), Exh C. (Magnuson Dep.), at 509-511. It is indisputable that such failures could not have resulted from plaintiff's rejection of any requests from Mr. Camarda.

Accordingly, it is hereby

ORDERED that, in motion sequence no. 006, the motion for summary judgment is granted and the third-party complaint is dismissed against Tremco Incorporated with costs and disbursements as calculated by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, in motion sequence no. 007, the motion for summary judgment is granted and the third-party complaint and all cross claims are dismissed as against Pace Plumbing Corp. with costs and disbursements as calculated by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, in motion sequence no. 008, the second third-party complaint and all cross claims are dismissed as against Prep-

Crete Inc. with costs and disbursements as calculated by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, in motion sequence no. 009, the third-party complaint and all cross claims are dismissed against SBLM Architects with costs and disbursements as calculated by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

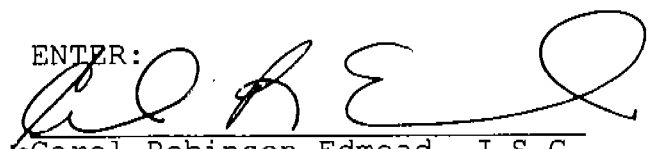
ORDERED that, in motion sequence 010, the motion for summary judgment is granted to the extent that the 5th, 6th, 23d, and 24th causes of action in the complaint are severed and dismissed; and it is further

ORDERED that counsel or Tremco shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel; and it is further

ORDERED that the remainder of this action will continue.

Dated: June 3, 2010

ENTER:



Carol Robinson Edmead, J.S.C.

FILED
HON. CAROL EDMEAD

JUN 03 2010

NEW YORK
COUNTY CLERK'S OFFICE